JUAHIR BIN SADIKON

v.

PERBADANAN KEMAJUAN EKONOMI NEGERI JOHOR

HIGH COURT MALAYA, JOHOR BAHRU
DATO' P.S. GILL J
[CIVIL SUIT NO. 22-264-86]
21 DECEMBER 1994

CONTRACT: *Claim for declaration, specific performance of option to purchase under a tenancy agreement and damages - Defendant counterclaiming for arrears of rental, mense profits and vacant possession - Purchase price and terms of sale to be determined by defendant - Plaintiff alleging oral representations made by chairman of defendant to sell premises at between RM7,500 to RM8,000 - Subsequent increase in price - Whether repudiation of agreement - Whether plaintiff's contentions proven.*

EVIDENCE: *Plaintiff exercising option to purchase property under terms of tenancy agreement - Plaintiff alleging oral representation on purchase price made by chairman of defendant company - Subsequent increase in price - Whether repudiation of agreement - Whether plaintiff's allegations supported by evidence - Failure to call chairman - Whether onus on defendant to call chairman - Whether an adverse inference could be drawn against defendant - Section 144(g) Evidence Act 1950.*

On 6 September 1977, the parties entered into a tenancy agreement. It was a term that on the expiration of the tenancy, provided there was no breach of the terms by the plaintiff and no arrears in rental, the plaintiff would be given the option to purchase the property upon written application not less than three months before the expiration of the renewal term. The purchase price and other terms were to be determined by the defendant.

The plaintiff claimed that he exercised the option to purchase and attended a dialouge between the chairman and other members of the defendant corporation on 26 September 1978 where oral representations were purportedly made to sell the property at betwen RM7,500 and RM8,000; but which sum was subsequently raised to RM14,000 in repudiation of the plaintiff's option to purchase. Upon cross examination the plaintiff admitted that the chairman had said he would discuss the matter of the proposed figures of RM7,500 to RM8,000 with the defendant corporation before making a written offer to the plaintiff. The plaintiff also agreed that he was late in exercising his option to purchase and was in arrears of rental for the premises since July 1985.

PW2, a wakil rakyat, admitted attending the meeting on 26 September 1978 but stated that no price was ever mentioned. DW1 stated that the plaintiff exercised his option to purchase after the expiration of the renewal term but admitted that the defendant had made a written offer after the expiry of the renewal term. DW2, the senior general manager of the defendant categorically stated that the chairman had no power to make any offer to sell the property without the approval of the board. Meanwhile, the plaintiff having failed to serve the subponea on the chairman of the defendant despite several adjournments and attempts made, submitted tha the onus was on the defendant to call the chairman to rebut the evidence of PW1 and PW2 as he had appeared as the representative of the defendant at the dialouge. Counsel contended that an adverse inference should be drawn against the defendant for failing to call this principal witness. The defendant in reply submitted that the plaintiff had

failed to discharge the burden of proof that there was any representation that the price would be in the region of RM7,500 to RM8,000 at the said meeting.

Held:

[1] There has been no cogent evidence to support the plaintiff's contention that such a representation to sell the premises at RM7,500 to RM8,000 was made by the chairman. The plaintiff's conduct in not responding to the defendant's subsequent offer to sell the property at RM14,000 amounted to a repudiation of the said offer.

[2] The Court could not accept the proposition of the plaintiff that an adverse inference be drawn against the defendant for failing to produce the chairman. It must be borne in mind that it was the plaintiff, who from the outset of the trial had subpoenaed the chairman. In fact, the Court had granted the plaintiff a series of adjournments to serve the said subponea on the said chairman. It would be unfair at this stage to suggest that the burden is on the defendant to produce the said witness. In the present case there is clearly no question of an attempt by the defendant either to withhold or to suppress evidence. There is therefore no justification whatsoever for drawing such an adverse inference under s. 114(g) of the Evidence Act.

[3] In the circumstances, the plaintiff's claim is dismissed with costs. Vacant possession of the premises is ordered against the plaintiff andthe interim injunction is set aside. The Court allows the defendant's counterclaim on the arrears of rental from July 1985 to date of vacant possession and orders interest thereon at 8% per annum on the said sum.

[Plaintiff's claim dismissed with costs. Defendant's counterclaim allowed]

Cases referred to:

Sardar Gurballsh v. Guchan Singh AIR [1927] PC 230 ***(refd)***
Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat & Anor. [1992] MLJ 68 ***(refd)***
Munusamy v. Public Prosecutor [1987] 1 MLJ 492 ***(cit)***

Legislation referred to:

The Evidence Act, s. 114(g)

For the plaintiff - Karpal Singh; M/s Karpal Singh & Co.
For the defendant - Wan Mansor Wan Mahmud (Ahmad Jalaluddin with him); M/s Roslani & A. J. Ariffin

JUDGMENT

P.S. Gill J:

The plaintiff's claim against the defendant is for a declaration that the plaintiff be entitled to purchase and the defendant be obligated to sell a piece of land namely House No. 38D. Lot No. PTD 7244, Mukim of Johor Bahru (hereinafter referred to as the said premises), and for specific performance of an agreement dated 6 September 1977 executed between the plaintiff and the defendant. The plaintiff also claims damages in addition to or in lieu of specific performance. The defendant denies the plaintiff's claim, and counter-claims for arrears of rental, mense profit of the said premises, and vacant possession.

The brief facts of the case are as follows.

The plaintiff and the defendant entered into a tenancy agreement on 6 September 1977. Under the terms of the said agreement, the defendant/landlord had agreed to let, and the plaintiff/ tenant had agreed to rent the said premises at a monthly rent of RM55.50. It was a term of the agreement, namely cl. 4(3)(a) that on expiration of the present terms, provided the tenant

has not committed any breach of any of the terms herein contained, and the rental hereof is not in arrears, the landlord may on the application of the tenant made in writing not less than three (3) months before the expiration of the renewal term, sell the demised premises together with the land on which the premises is situated, at a purchase price, and on such terms to be determined by the landlord, and notified to the tenant in writing.

It was also stated in cl. 4(3)(b) that the defendant/landlord on agreeing to sell and the plaintiff/tenant agreeing to purchase the total rent paid during the term of the present tenancy, and the deposit paid herein shall be calculated and treated as down payment to account of purchase price of the said premises.

It was plaintiff's case that the defendant by its agents or servants made oral representations to the plaintiff on 26 September 1978, confirming that the premises would be sold at a purchase price between RM7,500 to RM8,000. However subsequently, the defendant allegedly recanted, and offered to sell the said land to the plaintiff, for the sum of RM14,000, which the plaintiff avers, is unreasonable and excessive. The plaintiff had appealed against this, but the defendant has on their part, repudiated the plaintiff's option to purchase, and given the plaintiff notice to vacate the said land.

The plaintiff, Juahir bin Sadikon, testified in Court that he had entered into an agreement with the defendant corporation, for an option to purchase the said premises, and on completion of a period of tenancy for 3 years, for the conversion of the monthly rental paid towards the tenancy agreement as a deposit and part-payment towards the purchase price of the premises. The plaintiff decided to exercise this said option.

According to Encik Juahir, on 26 September 1978, he attended a dialogue between himself and Tan Sri Dato Hj. Basir bin Ismail, who was the then chairman of the State Economic Development Corporation. Apart from the plaintiff, those attending the dialogue were members of the said State Economic Development Corporation and a wakil rakyat, Tuan Haji Ali.

It was contended by the said plaintiff that at that meeting, it was firmly agreed upon, that the State Economic Development would sell the said premises at a purchase price of between RM7,500 and RM8,000. However subsequently, the State Economic Development Corporation reneged on their promise, and refused to sell at the initial price of RM7,500 to RM8,000 but instead offered to sell the premises at RM14,000. Further negotiations took place as regards this purchase price between the plaintiff and the corporation, without success. Instead, the plaintiff was offered a low cost flat in lieu of this land, which he refused.

The plaintiff also stated, that the tenancy agreement, had provided that the price of the premises be fixed between RM7,500 to RM8,000. However, cl. (4)(3a) of the agreement, which states:

> On expiration of the present terms, provided the tenant has not committed any breach of any of the terms herein contained and the rental hereof is not in arrears, the landlord may on the application of the tenant made in writing not less than three (3) months before the expiration of the renewal term, sell the demised premises together with the land on which the premises is situated at a purchase price and on such terms to be determined by the landlord and notified to the tenant in writing,

does not appear to support the plaintiff's proposition that the said premises be priced at RM7,500 to RM8,000.

The plaintiff did at some stage in his evidence under cross-examination state, that at the meeting on 26 September 1978, the proposed figures of RM7,500 to RM8,000 as purchase

price of the premises, were put to Tan Sri Dato Hj. Bashir and the said Tan Sri Dato Hj. Bashir had said that he would discuss the matter with the State Economic Development Corporation, before any offer is made in writing to the plaintiff.

The plaintiff agreed that he was late in exercising his option to purchase, as it ought to have been done in writing not less than **3** months before the expiration of the renewal term. The defendant, wrote to the plaintiff subsequently offering him the purchase of the said premises for RM14,000. This offer was totally rejected by the plaintiff. The plaintiff admitted receiving **notices to quit** from the defendant, which he failed to comply with. He also admitted in his evidence that he had not paid his rental for the premises since July 1985.

At the close of the plaintiff's evidence, Mr. Karpal Singh, Counsel for the plaintiff, made a request for an adjournment, on the basis that he intended to subpoena Tan Sri Dato Hj. Basir. The Court agreed to his request, and the case was adjourned.

At the continued hearing on a subsequent date, the plaintiff called PW2, one Hj. Ali bin Othman, a wakil rakyat to give evidence. He confirmed attending a meeting on 26 September 1978, between the State Economic Development Corporation and the plaintiff. He verified that at the meeting the said Tan Sri Dato Bashir had confirmed that the said premises in question would be sold to the plaintiff and others, but quite truthfully said, that no price was ever mentioned. The witness reiterated this fact in his evidence under cross-examination, as well as in his evidence when he was recalled subsequently by the plaintiff's Counsel.

On conclusion of PW2's evidence, the plaintiff's Counsel, once again informed the Court that they were not able to proceed, as they had not subpoenaed the said Tan Sri Bashir yet. Both parties then agreed that the said Tan Sri Bashir would give evidence after the defence case.

The defendant called Encik Razak bin Selamat, a managing director of Sindora Berhad, as the first defence witness, and briefly, he stated that the plaintiff exercised his rights of option to purchase the premises after the expiration of the renewal term. However, he did admit that, the defendant had made a written offer, after the expiry of the renewal term.

Encik Johari bin Mohamed was the second defence witness, and presently senior general manager of Johor State Economic Development Corporation. He categorically stated that Tan Sri Bashir, had no power to make any offer to sell the said premises at a price without the approval of the board.

At this stage, a subpoena on Tan Sri Dato Bashir had still not been served, and after representations were made by the plaintiff's Counsel, the Court allowed a final adjournment to the plaintiff to serve the subpoena on the said witness. On 12 September 1993, Mr. Karpal addressed the Court on the difficulty he had in trying to serve a subpoena on Tan Sri Bashir. Two attempts had already been made in vain. He then applied to the Court process server to serve the subpoena, and also sought the Court's indulgence for a final postponement. Despite protestations from the defendant's Counsel, the Court allowed a final adjournment to subpoena Tan Sri Bashir.

On 7 October 1993, when the case resumed for hearing, Mr. Karpal, merely recalled PW2.

A host of issues were raised during submissions, among which was the issue of calling Tan Sri Dato Hj. Bashir as a witness, and whose onus it was to do so.

The plaintiff's Counsel had submitted that the onus was on the defendant to call Tan Sri Dato Hj. Bashir to rebut the evidence of PW1 and PW2. In this case, according to the plaintiff,

the said Tan Sri Dato Hj. Bashir, had appeared as the representative of the defendant at the dialogue on 26 September 1978, as he was chairman of the State Economic Development Corporation. Effectively therefore, according to the plaintiff's Counsel, he was a witness for the defendant and that the defendant should have been called as a witness in line with the principle in *Sardar Gurballsh v. Guchan Singh* AIR [1927] PC 230.

Further to this, it was the contention of the plaintiff's Counsel, that a party **failing** to call as his witness the principal person involved in a transaction who was in a position to give a first hand account of the matters in controversy and to throw light on them, then it is legitimate in such instances to draw an adverse inference: Counsel for the plaintiff referred to the case of *Plenitude Holdings Sdn. Bhd. v. Tan Sri Khoo Teck Puat & Anor.* [1992] MLJ 68.

The defence in their reply submitted that the plaintiff had failed to prove that there was any representation, assurance, or promise whatsoever by the defendant that the price would be in the region of RM7,500 to RM8,000 at the said meeting on 26 September 1978.

Even the plaintiff's witness, Tuan Hj. Ali bin Othman, categorically denied that any representation was made by Tan Sri Bashir that the price was between RM7,500 to RM8,000. Further, there was nothing to suggest that there was any price stated in the tenancy agreement as alleged by the plaintiff. It was contended by the defendant that the burden of proof lies squarely on the plaintiff to prove that Tan Sri Dato Bashir had in fact made the said representations.

The Court was of the view that apart from the evidence of PW1, there was nothing forthcoming, in the plaintiff's case to suggest that Tan Sri Dato Hj. Bashir had in fact made a representation that, the said premises was to be sold at RM7,500 to RM8,000.

The Court could not accept the proposition of the plaintiff that an adverse inference be drawn against the defendant for failing to produce Tan Sri Bashir. It must be borne in mind that it was the plaintiff, who from the outset of trial had subpoenaed the said Tan Sri Bashir. In fact, from the chronology of events the Court had granted the plaintiff a series of adjournments to serve the said subpoena on the said Tan Sri Bashir. On the last occasion, the plaintiff had recalled PW2, and then closed the plaintiff's case, without informing the Court on the position of Tan Sri Bashir. It would be unfair at this stage, in my view, to suggest that the burden of proof is on the defendant, to produce the said witness. The authorities cited by the learned Counsel, can be **distinguished,** from the present set of facts, by the conduct of the plaintiff, throughout the trial in subpoenaing the said witness. It is an established principle of law that before an adverse inference under s. 114[g] of the Evidence Act can be drawn, there must be (a) withholding or suppression of evidence and (b) non production of an important and material document or witness. See *Munusamy v. Public Prosecutor* [1987] 1 MLJ 492. In the present case there is clearly no question here of an attempt by the defendant either to withhold or to suppress evidence. There is therefore no justification whatsoever for drawing such an adverse inference under s. 114(g) of the Evidence Act.

In the final analysis, since there has been **no** cogent evidence to support the plaintiff's contention that such an offer was made. I am fortified in my view of this, by the evidence of the plaintiff himself, during cross-examination that at the said meeting when the figures of RM7,500 to RM8,000 were put to Tan Sri Dato Hj. Bashir, he had merely said that he would discuss the matter with the State Economic Development Corporation before an offer is made in writing. I also find that the plaintiff's conduct in **not** responding to the defendant's offer

to sell the property at RM14,000 subsequently, amounted to a repudiation of the said offer. In the circumstances, the plaintiff's claim is dismissed with cost. In view of the fact that the plaintiff's claim has failed against the defendant, vacant possession of the premises is ordered against the plaintiff. Consequently, I order that the interim injunction be set aside.

On the issue of the counterclaim, the Court took cognizance of the fact that the plaintiff did, in his testimony, admit to not paying rental in regard to the premises since July 1985. As such, the Court allows the defendant's counterclaim on arrears of rental from July 1985 to date of vacant possession and also orders interest thereon at 8% per annum on the said sum.